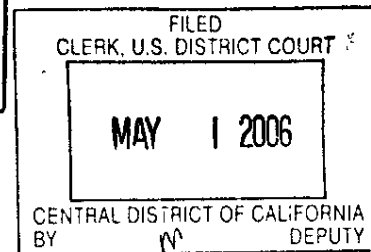
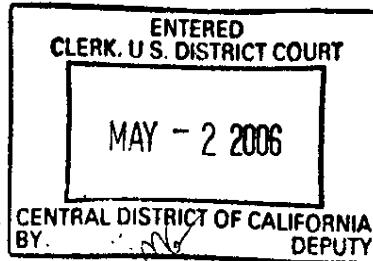


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THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILIA KOURTIS and
CONSTANTINOS KOURTIS,

Plaintiffs,

v.

JAMES CAMERON,
INTERNATIONAL CREATIVE
MANAGEMENT, MARIO KASSAR,
JEFFREY BERG and JOSEPH
ROSENBERG,

Defendants.

CASE NO. CV 02-2906 DT (RNBx)

**ORDER DENYING PLAINTIFFS'
MOTION TO VACATE THE
COURT'S ORDER REQUIRING THE
POSTING OF A COSTS BOND AS
TO JAMES CAMERON**

**ORDER DENYING DEFENDANT
JAMES CAMERON'S MOTION TO
DISMISS FOR FAILURE TO POST A
COSTS BOND**

**ORDER GRANTING DEFENDANT
MARIO KASSAR'S RENEWED
MOTION FOR PLAINTIFFS TO
POST A COSTS BOND**

I. Background

A. Factual Summary

Plaintiffs Filia and Con Kourtis ("Plaintiffs") are authors of the concept of "The Minotaur," an idea for a film. Plaintiffs claim that defendants James Cameron, International Creative Management ("ICM"), Jeffrey Berg, Joseph Rosenberg and Mario Kassir (collectively, "Defendants") copied their idea for a shape-changing character when they created the films "Terminator 2" and "Terminator 3." William Green, the writer plaintiffs hired to convert the Minotaur concept into a screenplay,

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1 sued these same defendants, among others, in 1993. Green v. Schwarzenegger, 1995
2 U.S. Dist. LEXIS 14,031 (C.D. Cal. July 11, 1995) (Byrne, J.), aff'd, 107 F.3d 877
3 (9th Cir. 1997). On July 1, 1994, the Court issued an order granting summary
4 judgment in favor of the defendants on Green's copyright claim, on the ground that
5 "no reasonable factfinder could find that plaintiff's work and 'Terminator 2' are
6 substantially similar under federal copyright law." Green, 1995 U.S. Dist. LEXIS
7 14,031, at *2.

8 Plaintiffs later prevailed in an Australian lawsuit against Green to determine
9 who owned the rights to the Minotaur concept. See Kourtis v. Cameron, 2003 U.S.
10 Dist. LEXIS 26,603, at *5-6 (C.D. Cal. May 2, 2003) (Byrne, J.). Plaintiffs then
11 filed this action for copyright infringement as well as several state law claims. Id.
12 at *6. In 2003, the District Court dismissed all claims – the state law claims on
13 statute of limitations grounds, and the copyright claim because it determined
14 collateral estoppel applied. Id. at *22. Plaintiffs appealed. The Ninth Circuit
15 affirmed dismissal of the state law claims, but concluded that collateral estoppel did
16 not preclude Plaintiffs from pursuing their copyright claim, and the case was
17 remanded. Kourtis v. Cameron, 419 F.3d 989 (9th Cir. 2005).

18 On February 14, 2006, the Court issued an Order granting Cameron's Motion
19 for Plaintiffs to Post a Costs Bond in the amount of \$100,000. Kourtis v. Cameron,
20 Case No. CV 02-2906 DT (RNBx), at p. 9 (C.D. Cal. Feb. 14, 2006) (hereinafter, the
21 "Costs Bond Order"). At the same time, the Court denied Kassar's Motion for
22 Plaintiffs to Post a Costs Bond due to his failure to set forth the "nature and amount"
23 of the requested fees. Id. On March 6, 2006, the Court issued an Order granting
24 Cameron, ICM, Berg and Rosenberg's Motion to Dismiss without prejudice and with
25 leave to amend within thirty days. Kourtis v. Cameron, Case No. CV 02-2906 DT
26 (RNBx), at p. 10 (C.D. Cal. Mar. 6, 2006) (hereinafter, the "Order of Dismissal").
27 In turn, Plaintiffs filed an Amended Complaint on April 5, 2006. Plaintiffs have not
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1 posted the costs bond for Cameron, although they claim that their Amended
2 Complaint vitiates the underlying reasons for which they were ordered to post such
3 a bond.

4 Most of Plaintiffs' Amended Complaint is taken word-for-word from the
5 original Complaint, and just a few paragraphs pertaining to claims that have been
6 dismissed from this case have been dropped. However, paragraphs 57 through 68
7 contain new or amended facts, pertaining to the history of this matter and the
8 production and release of the film "Terminator 3." Most pertinently, the Amended
9 Complaint states:

10 60. On information and belief, Defendants, all of them, have entered
11 into licensing agreements or other agreements whereby a certain
12 amount is paid to them each time money is made on an
13 infringement of copyright through the sales of DVD's, videos,
14 and television showings of ["Terminator 3"], etc., i.e., by
15 controlling the distribution of the film, because they are in a
16 position to control the infringements or they contributed to the
17 infringements they are vicariously liable for all the infringements
18 of copyright which has been going on within the last three years
19 prior to the filing of this lawsuit and continuing into the present.

20 61. In addition, Kassar went forward and completed the film
21 ["Terminator 3"] while this case was at the District Court level.
22 Thus, the film ["Terminator 3"] was never litigated by Green and
23 is not subject to collateral estoppel doctrine or to the SOL
24 affirmative defense.

1 Amended Complaint ¶¶ 60-61.¹ Whereas in the original Complaint Plaintiffs alleged
 2 only a general infringement of their copyright, in their Amended Complaint they
 3 allege direct, contributory and vicarious infringement. Compare Complaint ¶¶ 60-63
 4 with Amended Complaint ¶¶ 62-68. The Amended Complaint does not otherwise
 5 explain what aspects of “Terminator 3” infringed on “The Minotaur.”

6 There are now three pending motions before the Court, the resolutions of
 7 which are co-dependent. First, defendant Kassar filed a motion to renew or
 8 reconsider the Court’s ruling not requiring Plaintiffs to post a costs bond as to
 9 Kassar. Second, Plaintiffs filed a motion seeking to vacate the Court’s Order
 10 requiring them to post a costs bond as to defendant Cameron. Third, defendant
 11 Cameron filed a motion to dismiss for Plaintiffs’ failure to post the required costs
 12 bond. The Court will address all three motions at this time.²

13
 14 ¹ Additionally, paragraph 55 of the Amended Complaint states: “Ms.
 15 Abramowitz goes on to describe the process by which Kassar bought Carolco’s
 16 ‘franchise’ rights in [“Terminator 2”] anticipating producing [“Terminator 3”] which
 17 continues the morphing and shape changing mass as was done in [“Terminator 2.”]
 18 Amended Complaint ¶ 55. This identical to paragraph 57 of the original Complaint,
 and refers to an article written prior to the production of “Terminator 3.”

19 ² Under Local Rule 7-3,
 20 counsel contemplating the filing of any motion shall first contact
 21 opposing counsel to discuss thoroughly, *preferably in person*, the
 22 substance of the contemplated motion and any potential resolution . . .
 23 If the parties are unable to reach a resolution which eliminates the
 24 necessity for a hearing, counsel for the moving party shall include in the
 25 notice of motion a statement to the following effect: This motion is
 26 made following the conference of counsel pursuant to L.R. 7-3 which
 27 took place on (date).
 28 (emphasis in original). None of the three motions that are the subject of this Order
 included such a statement in its Notice of Motion, and presumably, none of the
 motions were brought following a conference of counsel (although Cameron’s
 counsel, Charles Shephard, did communicate several times with Plaintiffs’ counsel,

B. Procedural Summary

On April 9, 2002, Plaintiffs filed their Complaint in the United States District Court for the Central District of California, and this action was assigned to Judge A. Howard Matz.

On May 3, 2002, the case was transferred to Judge William Matthew Byrne, Jr. for all further proceedings, pursuant to General Order 224.

On July 22, 2002, defendants ICM, Green and Rosenberg filed a Notice of Motion and Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted. On August 13, 2002, Kassar was permitted by the Court to join the Motion to Dismiss.

On May 2, 2003, the Court granted Defendants' Motion to Dismiss and on June 18, 2003, Judgment was entered on behalf of all Defendants.

Plaintiffs appealed to the Ninth Circuit Court of Appeals, which issued its decision affirming in part and reversing in part the District Court on August 15, 2005.

On remand, defendants Cameron and Kassar moved for Plaintiffs to post a costs bond before proceeding with this litigation. Cameron filed his Notice of Motion and Motion on December 9, 2005. Kassar filed a Notice of Joinder and Joinder on December 19, 2005.

On January 24, 2006, the case was reassigned to Judge Dickran Tevrizian for all further proceedings.

On January 30, 2006, defendant Kassar filed an Answer to the Complaint.

Also on January 30, 2006, defendant Cameron filed a Motion of Motion and Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted.

Patricia Barry, prior to the filing of Cameron's Motion to Dismiss). Although the Court considers these motions today, going forward, the parties are warned that the Court will deny any further motions that do not comply with Local Rule 7-3.

1 On January 31, 2006, defendants ICM, Berg and Rosenberg filed a Notice of Joinder
2 and Joinder to Cameron's Motion to Dismiss.

3 On February 14, 2006, the Court issued an Order granting Cameron's Motion
4 for Plaintiffs to Post a Costs Bond, and denying Kassar's Motion for the same.

5 On March 6, 2006, the Court granted Cameron, ICM, Berg and Rosenberg's
6 Motion to Dismiss without prejudice and with leave to amend within thirty days.

7 On March 20, 2006, Kassar filed a Notice of Motion and Motion for
8 Reconsideration of the Court's Order denying his Motion for Plaintiffs to Post a
9 Costs Bond. On April 17, 2006, Plaintiffs filed their Opposition. On April 24, 2006,
10 Kassar filed his Reply.

11 On March 30, 2006, Cameron filed an Ex Parte Application for an Order of
12 Dismissal due to Plaintiff's Failure to Post a Costs Bond.

13 On April 5, 2006, Plaintiffs filed their First Amended Complaint.

14 On April 5, 2006, Plaintiffs also filed an Notice of Motion and Motion to
15 Vacate the Court's Order for Plaintiffs to Post a Costs Bond. On April 17, 2006,
16 Cameron filed his Opposition. A Reply has not been filed.

17 On April 6, 2006, the Court denied Cameron's Ex Parte Application for
18 Dismissal, without prejudice to file a properly-noticed motion.

19 On April 10, 2006, Cameron filed a Notice of Motion and Motion for
20 Dismissal due to Plaintiff's Failure to Post a Costs Bond. On April 17, 2006,
21 Plaintiffs filed their Opposition. On April 24, 2006, Cameron filed his Reply.

22 On April 18, 2006, defendants ICM, Berg and Rosenberg filed an Answer to
23 the First Amended Complaint. On the same day, defendant Kassar filed an Answer
24 to the First Amended Complaint.

SCANNED

II. Discussion

A. Standards

1. Costs Bonds

Federal courts may require plaintiffs to post a bond in order to provide security for defendants who might prevail in litigation. See Simulnet E. Assocs. v. Ramada Hotel Operating Co., 37 F.3d 573, 574 (9th Cir. 1994). A district court normally follows the forum state's practice, particularly when the party is a non-resident. See id.; In re Merrill Lynch Relocation Mgmt., Inc., 812 F.2d 1116, 1121 (9th Cir. 1987).

In California:

When the plaintiff in an action or special proceeding resides out of the state, or is a foreign corporation, the defendant may at any time apply to the court by noticed motion for an order requiring the plaintiff to file an undertaking to secure an award of costs and attorney's fees which may be awarded in the action or special proceeding. For the purposes of this section, "attorney's fees" means reasonable attorney's fees a party may be authorized to recover by a statute apart from this section or by contract.

Cal. Civ. Proc. Code § 1030(a). The defendant must also show there is a "reasonable possibility" that the defendant will obtain judgment. Id. § 1030(b). The defendant's motion must be accompanied by an affidavit setting "forth the nature and amount of the costs and attorney's fees the defendant has incurred and expects to incur by the conclusion of the action or special proceeding." Id. If the Court determines that grounds for the motion have been established, it shall order the plaintiff to file an undertaking for the amount specified in its order. Id. § 1030(c). California recognizes attorney's fees as costs when properly authorized. Id. § 1033.5(a)(10).

This undertaking must be filed not later than thirty days after service of the

1 court's Order requiring it, or within a greater time allowed by the Court. Id. §
 2 1030(d). If the plaintiff fails to file the undertaking within the time allowed, the
 3 plaintiff's action shall be dismissed as to the defendant in whose favor the Order
 4 requiring the undertaking was made. Id. However, failure to file within a proscribed
 5 time is not jurisdictional, and the court may accept a late filing at its discretion. See
 6 Boyer v. County of Contra Costa, 235 Cal. App. 2d 111, 115 (1965). Furthermore,
 7 a dismissal caused by a failure to file an undertaking only occurs following a
 8 properly-noticed motion. Id.; Shell Oil Co. v. Superior Court of Sonoma County, 2
 9 Cal. App. 2d 348, 354 (1934).

10 A court may also determine that the amount of a bond is excessive and order
 11 such amount reduced under its discretion, as long as the order is subject to any
 12 limitations in the statute providing for the bond. Cal. Civ. Proc. Code § 996.030(a).
 13 This determination shall be made upon a properly-noticed motion, and the moving
 14 party may then submit a bond in the new amount. Id. §§ 996.030(b)-(c). The court
 15 may, in its discretion, allow this new bond to be posted by the end of a period not
 16 less than five days. Id. §§ 996.010(c); 996.030(b).

17 2. Relief from Judgment or Order

18 Federal Rule of Civil Procedure 60(b) states: "On motion and upon such
 19 terms as are just, the court may relieve a party or a party's legal representative from
 20 a final judgment, order or proceeding for the following reasons . . . (6) any other
 21 reason justifying relief from the operation of the judgment." Rule 60(b)(6) "does not
 22 particularize the factors that justify relief, but . . . it provides courts with authority
 23 'adequate to enable them to vacate judgments whenever such action is appropriate
 24 to accomplish justice' [although] it should only be applied in 'extraordinary
 25 circumstances.'" Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863
 26 (1988) (citations omitted). "Rule 60(b)(6) relief normally will not be granted unless
 27 the moving party is able to show both injury and that circumstances beyond its
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1 control prevented timely action to protect its interests.” United States v. Alpine
2 Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir. 1997).

3 While subsection (6) has occasionally been characterized in broad terms, see
4 United States v. Sparks, 685 F.2d 1128, 1130 (9th Cir. 1982) (quoting Klapprott v.
5 United States, 335 U.S. 601, 615 (1949)) (Rule 60(b)(6) “gives the district court
6 power to vacate judgments ‘whenever such action is appropriate to accomplish
7 justice’”), the Ninth Circuit has repeatedly admonished that relief under Rule
8 60(b)(6) is only appropriate where there exists “exceptional circumstances.”
9 See Sparks, 685 F.2d at 1130 (quoting Ackerman v. United States, 340 U.S. 193, 199
10 (1950)); Allamerica Fin. Life Ins. & Annuity Co. v. Llewellyn, 139 F.3d 664, 665
11 (9th Cir. 1998) (quoting Ackerman, 340 U.S. at 199). Put otherwise, Rule 60(b)(6)
12 “has been used sparingly as an equitable remedy to prevent manifest injustice. The
13 rule is to be utilized only where extraordinary circumstances prevented a party from
14 taking timely action to prevent or correct an erroneous judgment.” Alpine Land &
15 Reservoir Co., 984 F.2d at 1049 (9th Cir. 1993).

16 3. Motion for Reconsideration

17 A motion for reconsideration of the decision of any motion may be made on
18 one of only three grounds:

19 (a) a material difference in fact or law from that presented to the Court
20 before such decision that in the existence of reasonable diligence could
21 not have been known to the party moving for reconsideration at the
22 time of such decision, or (b) the emergence of new material facts or a
23 change of law occurring after the time of such decision, or (c) a
24 manifest showing of a failure to consider material facts presented to the
25 Court before such decision.

26 Local Rule 7-18.

1 **B. Analysis**

2 1. Procedural Determinations

3 a. Plaintiffs' Costs Bond As It Concerns Cameron

4 Plaintiffs bring their motion to vacate the Court's Order pursuant to Federal
5 Rule of Civil Procedural 60(b)(6), which is normally reserved for "extraordinary
6 circumstances." See Liljeberg, 486 U.S. at 863. Without analyzing either the intent
7 of Rule 60(b)(6) or precedent construing it, the Court is highly dubious that the filing
8 of an amended complaint is an extraordinary circumstance that would justify this
9 motion. Regardless, Rule 60(b) "applies only to motions attacking final, appealable
10 orders." See, e.g., United States v. Martin, 226 F.3d 1042, 1048 n.8 (9th Cir. 2000)
11 (citing cases). However, an order granting a motion for a nonresident to post a costs
12 bond is non-appealable. Cal. Civ. Proc. Code § 1030(g). Therefore, Plaintiffs'
13 motion may not be brought under Rule 60(b)(6).

14 However, Plaintiffs are not limited to Rule 60(b)(6). First, as Cameron points
15 out, Plaintiffs' motion could have been brought as a motion for reconsideration
16 under Local Rule 7-18. The filing of Plaintiffs' amended complaint added new facts
17 to its claims in this matter. These new facts materially differ from those found in the
18 original complaint. The Court believes this serves as "the emergence of new
19 material facts . . . occurring after the time of" the Court's original decision, as
20 required under Rule 7-18(b).

21 Second, a district court normally follows the forum state's practice regarding
22 the filing of costs bonds, particularly when the party is a non-resident. See Simulnet
23 E. Assocs., 37 F.3d at 574; Merrill Lynch Relocation Mgmt., 812 F.2d at 1121.
24 California procedure permits a party to file a motion asking the Court to determine
25 that the amount of a bond is excessive and order such amount reduced under its
26 discretion, as long as the order is subject to any limitations in the statute providing
27 for the bond. Cal. Civ. Proc. Code §§ 996.030(a)-(b). This would be the practical
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1 effect of Plaintiffs' motion, if granted. Therefore, the Court deems Plaintiffs' motion
2 as one properly filed under section 996.030 and/or Rule 7-18(b).

3 Additionally, the Court notes that Plaintiffs' and Cameron's motion are
4 incompatible. Essentially, if one is granted, at least in full, then the other is
5 realistically moot. Therefore, the Court must determine how to consider both
6 motions at this time.

7 It is undisputed that Plaintiffs have not filed the costs bond as ordered by the
8 Court on February 14, 2006, and certainly did not file such a bond within the thirty-
9 day period required by California Civil Procedure Code section 1030(d). However,
10 Plaintiffs believe that their Amended Complaint has vitiated a need for such a bond.
11 At the same time, Cameron has moved for dismissal of the claim against him, due
12 to Plaintiffs' failure to post the bond within the required thirty-day period.

13 Because dismissal due to failure to post a costs bond is not self-executing –
14 that is, dismissal may only occur after a properly-noticed motion, see Boyer, 235 Cal.
15 App. 2d at 115; Shell Oil Co., 2 Cal. App. 2d at 354 – this Court may only consider
16 dismissal as of the date on which Cameron filed his motion. Because Plaintiffs filed
17 their motion to vacate the costs bond requirement prior to that date, the Court will
18 consider Plaintiffs' motion first.³ Therefore, if Plaintiffs can successfully convince
19 the Court to vacate its Order, then Cameron's motion will be moot.⁴

21 ³ Cameron's improper March 30, 2006 filing of an Ex Parte Application for an
22 Order of Dismissal has no bearing on this determination.

23 ⁴ Although the Court will first address Plaintiffs' Motion to Vacate, it must
24 express its concern about the disregard Plaintiffs, and their counsel, have shown for
25 the Court's Order of February 14. Plaintiffs were ordered to post a costs bond in the
26 manner specified by the California Civil Procedure Code, *i.e.*, within thirty days, or
27 by March 16. That time went by with no action by Plaintiffs. They did not post a
28 costs bond. They did not move to vacate or amend the Court's Order. And they did
not file an amended complaint, which might have given them a basis to so move,

b. Kassar's Motion for Plaintiffs to Post a Costs Bond

This Court previously denied Defendant Kassar's Motion for Plaintiffs to Post a Costs Bond. At that time, the Court found that there was "a 'reasonable possibility' that Kassar will prevail by showing 'Terminator 2' and 'The Minotaur' are not substantially similar." Costs Bond Order, at p. 5. Despite a costs bond being available to Kassar, though, the Court noted:

Kassar has not properly set forth "the nature and amount of the costs and attorney's fees the defendant has incurred and expects to incur by the conclusion of the action," as required by California Civil Procedure Code section 1030(b). More information is required before the Court can examine the reasonableness of Kassar's request, and therefore, the Court cannot determine a proper bond amount as to Kassar at this time.

As such, Kassar's motion is denied.

Id. at p. 8.

Kassar now bring a motion to either renew or reconsider his previous motion. Kassar has submitted information – a declaration of his counsel, Howard Horwitz – that he contends will remedy his earlier omission. The Court sees no reason why Kassar may not renew his previous motion, or alternatively have the Court reconsider it under Local Rule 7-18(b), at this time.

However, as Plaintiffs have filed an amended complaint since the filing of Kassar's renewed motion, the Court must necessarily consider Kassar's motion as it pertains to the amended complaint.

within that time. Instead, Plaintiffs waited until April 5 – twenty days after the period proscribed by state law expired – to file their current motion and their Amended Complaint. The Court is disappointed in Plaintiffs' actions, which reek of self-help. At the least, a timely motion to vacate, or alternatively posting the required bond prior to the deadline and present motion, would have avoided the costly and unnecessary duplicate motions before the Court.

2. Plaintiffs' Motion to Vacate the Costs Bond Order

On February 14, 2006, the Court ordered that Plaintiffs post a costs bond in favor of Cameron based on two separate grounds upon which it found that Cameron had a reasonable possibility of obtaining judgment: first, that it was likely the Court would find that "The Minotaur" and "Terminator 2" are not substantially similar under federal copyright law, based on its findings in the related Green case;⁵ and second, that Plaintiffs' claim was barred by the statute of limitations for copyright violations. Since that time, Plaintiffs have submitted an amended complaint. They believe that their amendments have cured whatever defects caused the Court to order the costs bond in the first place.

First, the Court does not believe that the amendments have directly cured either of the two grounds upon which the Court found Cameron had a reasonable possibility of obtaining judgment.⁶ First, Plaintiffs' amended complaint has added no new facts concerning "Terminator 2." Several months ago, this Court noted:

The Court has already determined that "no reasonable factfinder could find that ['The Minotaur'] and 'Terminator 2' are substantially similar

⁵ Plaintiffs apparently misconstrue the Court's Costs Bond Order. They state that the "Court granted the motion based on Defendant Cameron's similarity/collateral estoppel . . . argument[]." Motion to Vacate, at pp. 1-2. But collateral estoppel had nothing to do with it. The standard is simply a "reasonable possibility" of obtaining judgment. The Court noted that, in a previous litigation, it had compared the two works and found that they lacked substantial similarity as a matter of law. Costs Bond Order, at pp. 5-6. It commented that, if provided the same evidence and arguments it had been in the earlier litigation, there was no reason to believe the results would be any different. Id. at p. 5. It then went out of its way to point out that its "determinations do not mean that the Moving Defendants will ultimately prevail. Discovery can unearth unexpected evidence, and new arguments can be persuasive." Id. at p. 6 n.1. In no way are Plaintiffs collaterally estopped from arguing the substantial similarity of "The Minotaur" and "Terminator 2."

⁶ Plaintiffs do not contend that they no longer reside out of state.

1 under federal copyright law.” Green, 1995 U.S. Dist. LEXIS 14,031,
 2 at *2. Plaintiffs may reassert this claim, and they maintain the result
 3 will be different this time, but their Opposition is not persuasive that
 4 any new evidence will alter the Court’s prior analysis. The Court finds
 5 it is at least a “reasonable possibility” that the works are not
 6 substantially similar.

7 Costs Bond Order, at p. 5. Nothing has changed since that time. Therefore, the
 8 Court maintains its finding that it is a reasonable possibility that Cameron will
 9 prevail by showing “The Minotaur” and “Terminator 2” are not substantially similar.

10 Second, the Court also noted:

11 there is a “reasonable possibility” there is a statute of limitations bar as
 12 to Cameron . . . Cameron declared that his work on “Terminator 2”
 13 ended around 1991, and he has not been involved in its distribution at
 14 any time since then . . . This is well outside the limitations period, and
 15 at this time the Plaintiffs present no evidence showing any of
 16 Cameron’s conduct falls within the limitations period.

17 Id. Once again, nothing has changed since that time. Therefore, the Court maintains
 18 its finding that it is a reasonable possibility that Cameron will prevail on his
 19 limitations defense, in that any of his conduct relating to “Terminator 2” ended
 20 before April 9, 1999.

21 In their Amended Complaint, though, Plaintiffs add what essentially amounts
 22 to an entirely new cause of action against the Defendants, including Cameron. The
 23 Amended Complaint alleges that “Terminator 3” infringes upon “The Minotaur.”
 24 Furthermore, according to Plaintiffs, because “Terminator 3” was created within the
 25 applicable statute of limitations, and because it was not the subject of the earlier
 26 Green lawsuit, there is not a “reasonable possibility” that Cameron will prevail.

27 First, the Court notes that Plaintiffs’ two factual contentions are correct. The
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1 limitations period for any claims for infringement based on "Terminator 3" had not
2 run at the time of the filing of this lawsuit. See 17 U.S.C. § 507(b) (limitations
3 period of three years). Additionally, the potential infringement of "Terminator 3"
4 was not litigated in the earlier lawsuit. However, the Court disagrees with Plaintiffs'
5 ultimate conclusion.

6 Specifically, the Court finds that Cameron has a reasonable possibility of
7 prevailing on Plaintiffs' claims that "Terminator 3" infringed their work. Although,
8 in their Amended Complaint, Plaintiffs add allegations concerning "Terminator 3,"
9 nowhere do they explain which aspects of the sequel are infringing. In fact, attached
10 to Plaintiffs' original Complaint is Exhibit I, which lists twenty alleged similarities
11 between "The Minotaur" and "Terminator 2." This exhibit has been excised from
12 Plaintiffs' Amended Complaint, and there is no similar listing of similarities between
13 "Terminator 3" and "The Minotaur." Absent such allegations or any other
14 information concerning the alleged infringement, the Court will assume, taking all
15 inferences in favor of Plaintiffs, that "Terminator 3" allegedly infringed "The
16 Minotaur" in the same manner as "Terminator 2" allegedly did in the original
17 complaint.

18 For the same reasons, then, it is a "reasonable possibility" that Plaintiffs' claim
19 will fail. The Court has already determined that "no reasonable factfinder could find
20 that ['The Minotaur'] and 'Terminator 2' are substantially similar under federal
21 copyright law." Green, 1995 U.S. Dist. LEXIS 14,031, at *2. When doing so, the
22 Court closely compared the similarities alleged by Green and found them lacking.
23 Once again, Plaintiffs are not collaterally estopped from pursuing their copyright
24 infringement claim, Kourtis, 419 F.3d at 999, nor are they precluded from submitting
25 new evidence or making new arguments to the Court. Costs Bond Order, at p. 5.
26 However, neither Plaintiffs' Amended Complaint nor its Motion and Oppositions are
27
28

1 persuasive that any new evidence or arguments will alter the Court's prior analysis.⁷
2 Given that, in the prior case, the Court determined that "no reasonable factfinder"
3 could find the works substantially similar, it is at least a "reasonable possibility" that
4 they will be found not substantially similar in this matter.

5 Plaintiffs seem to believe that, by claiming that "Terminator 3" infringed "The
6 Minotaur," the Green decision will have no ongoing relevance, but that belief is
7 misplaced. If Plaintiffs allege that "Terminator 3" infringes "The Minotaur" in the
8 same manner that "Terminator 2" did – the Court cannot see any other reasonable
9 conclusion from Plaintiffs' submissions – and the Court has already determined that
10 "no reasonable factfinder" could find the works "Terminator 2" and "The Minotaur"
11 substantially similar, then it stands to follow that no reasonable factfinder could find
12 the works "Terminator 3" and "The Minotaur" substantially similar either. Once
13 again, collateral estoppel does not apply, and there is no guarantee that this will be
14 the ultimate conclusion in this matter. But, as of now, it is a reasonable possibility
15 that "Terminator 3" and "The Minotaur" are not substantially similar, and that
16 Cameron will prevail on this issue.

17 The addition of discrete claims of contributory and vicarious infringement by
18 Cameron do not alter this analysis. Each still requires direct infringement by the
19 primary infringer. MGM Studios, Inc. v. Grokster, Ltd., 380 F.3d 1154, 1160, 1164
20 (9th Cir. 2004), rev'd on oth. grounds, 545 U.S. _____, 125 S. Ct. 2764 (2005).
21 Direct infringement, in turn, requires proof of substantial similarity, at least in the
22 absence of direct evidence of copying, see, e.g., Swirsky v. Carey, 376 F.3d 841, 844
23 (9th Cir. 2004), evidence which is not present here. If "Terminator 3" is not
24 substantially similar to "The Minotaur," then it would eliminate these claims of
25 _____

26 ⁷ In fact, despite Cameron's arguments and the Court's Costs Bond Order,
27 Plaintiffs do not point to any new arguments or evidence that might change the
28 factfinder's determination.

1 vicarious and contributory infringement as well.⁸

2 Therefore, the Court finds there is a "reasonable possibility" that Cameron will
3 obtain judgment on Plaintiffs' Amended Complaint.⁹

4
5 ⁸ Cameron additionally submits a declaration stating that he had no
6 involvement in "Terminator 3," has not entered into licenses or other agreements
7 concerning "Terminator 3," and is not entitled to and has not received compensation
8 due to "Terminator 3." Cameron Decl., at ¶ 2-4. The Court need not consider
Cameron's arguments based on these statements.

9 ⁹ Although not addressed by either party, the Court is additionally unsure of the
10 propriety of Plaintiffs' amendments to their original Complaint. The Court stated in
11 its Order of Dismissal:

12 ... [T]he crux of this motion concerns whether the statute of limitations
13 has run on Plaintiffs' copyright claims. The statute of limitations on
14 claims of copyright infringement is three years, see 17 U.S.C. § 507(b),
15 and runs from the time plaintiff knows or has reason to know of the
16 defendant's infringement. See Kling, 225 F.3d at 1038. Plaintiffs claim
they discovered the infringing nature of "Terminator II" in late 1991.
Therefore, Plaintiffs would have been required to file suit for copyright
infringement by late 1994. They did not do so.

17 However, Plaintiffs claim that "Terminator II" has been
18 continuously infringing their copyright. Plaintiffs' complaint was filed
19 on April 9, 2002. Any infringements that are still actionable – that is,
20 are not barred by the statute of limitations – must have occurred on or
21 after April 9, 1999. See Roley, 19 F.3d at 481. Plaintiffs claim many
22 instances of infringement subsequent to April 9, 1999; to wit, the airing
23 of "Terminator II" on television, the sale and rental of DVDs and videos
of "Terminator II," and the marketing and sale of products based on the
movie (such as video games and action figures). If accurate, these
appear to properly allege the infringement of Plaintiffs' rights.

24 However, Plaintiffs' pleadings currently contain a fatal flaw,
25 pointed out by Defendants. A careful reading of the Complaint shows
26 that no claim has been stated against Cameron, ICM, Berg or Rosenberg
27 during the operative time period. Plaintiffs have not specifically alleged
28 that the Defendants exploited the film, broadcast the film, manufactured
DVDs or videos, or otherwise used Plaintiffs' creative materials, on or

1 Because Plaintiffs continue to reside out-of-state, there is a “reasonable
 2 possibility” that Cameron will prevail in this action, and attorneys’ fees and costs
 3 may be awarded, a costs bond remains proper as to Cameron. Additionally,
 4 Plaintiffs present no arguments in addition to those addressed above concerning the
 5 continued vitality of the \$100,000 amount as set by the Court in its Costs Bond
 6 Order. Therefore, the Court finds that the requirement that Plaintiffs post a costs
 7 bond in the amount of \$100,000 remains proper, and denies Plaintiffs’ motion.

8 3. Cameron’s Motion to Dismiss

9 Although California Civil Procedure Code section 1030(d) requires any Court-
 10 ordered costs bond to be filed within thirty days, Plaintiffs failed to file within the
 11 required time period. Furthermore, although Plaintiffs attempted to vacate the Costs
 12 Bond Order, the Court has denied their motion. For these reasons, the Court may
 13 consider Cameron’s motion to dismiss at this time.

14
 15
 16 subsequent to April 9, 1999. Nor do Plaintiffs allege that the
 17 Defendants granted any rights to others to do so during this time period.
 18 In short, at this time Plaintiffs fail to state a claim against Cameron,
 19 ICM, Berg or Rosenberg upon which relief may be granted.
 20 Id. at pp. 9-10. In sum, Plaintiffs failed to link the conduct of Defendants to the
 21 allegedly infringing actions concerning “Terminator 2” during the post-April 9, 1999
 22 period.

23 Although the Court granted Defendants’ Motion to Dismiss, it did so without
 24 prejudice and gave Plaintiffs leave to amend within thirty days. Plaintiffs thereafter
 25 filed their Amended Complaint during this thirty-day period. Instead of amendments
 26 meant to cure the flaw pointed out by the Court (concerning the lack of linkage of the
 27 Defendants to the exploitation of “Terminator 2” during the operative time period),
 28 Plaintiffs’ amendments instead added claims of infringement concerning “Terminator
 3” during that time period. This was somewhat confusing, as it was unclear whether
 the few references to “Terminator 3” in the original Complaint constituted claims
 based upon that film. At the least, the Court questions the propriety of Plaintiff’s
 amendments. This, though, is an issue for the parties to examine, and it is not
 pertinent to the Court’s determinations concerning the present motions.

1 As noted earlier, the Court is disappointed in the manner in which Plaintiffs
 2 have proceeded concerning the Court's prior Costs Bond Order. Nevertheless, it
 3 realizes that Plaintiffs may have believed changed circumstances might have
 4 convinced the Court to vacate its previous Order, or at the least reduce the amount
 5 awarded. For this reason, and given the drastic remedy for failure to post a costs
 6 bond, the Court will exercise its discretion under section 1030(d) that permits an
 7 undertaking to be filed within a time greater than thirty days as allowed by the Court,
 8 and will permit Plaintiffs ten days from the date of this Order to file a costs bond as
 9 to Cameron in the amount of \$100,000.¹⁰ See also Boyer, 235 Cal. App. 2d at 115
 10 (court may accept a late filing at its discretion). If Plaintiffs do not file such a bond
 11 within that period, the Court will permit Cameron to renew his motion to dismiss
 12 without briefing it anew, and it is likely that Cameron will be dismissed from this
 13 action.

14 At this time, Cameron's motion is denied, although he may renew it under the
 15 circumstances set forth in the preceding paragraph. Plaintiffs shall file the costs
 16 bond within ten days.

17 4. Kassar's Renewed Motion for Plaintiffs to Post a Costs Bond

18 Kassar previously proved that there was a "reasonable possibility" that Kassar
 19 would obtain judgment by showing "Terminator 2" and "The Minotaur" are not
 20 substantially similar. Costs Bond Order, at p. 5. Kassar now provides the Court
 21 additional information concerning the reasonableness of his proposed bond so that
 22 the Court might set a proper amount.

23 As noted above, Kassar filed his Motion to Renew or Reconsider his previous
 24

25 ¹⁰ In their Oppositions, Plaintiffs stated that they intended to file an Application
 26 to Proceed with Waiver of Costs, based on their indigence, along with their Reply.
 27 Neither this Reply nor any Application has been received by the Court, and cannot
 28 be considered in this Order.

1 motion on March 20, 2006. Since that time, Plaintiffs have filed an Amended
2 Complaint. Therefore, the Court must consider Kassir's motion as it pertains to the
3 Amended Complaint.

4 The Court previously determined that Kassir was entitled to a costs bond
5 because (1) Plaintiffs resided in Australia, *i.e.*, out of state, and (2) there was a
6 "reasonable possibility" that he would obtain judgment in this action because, in the
7 Green litigation, the Court had already determined that no reasonable factfinder
8 could find the works substantially similar. Costs Bond Order, at pp. 4-6. Plaintiffs
9 have done nothing to alter this analysis. They still reside out of state, and they have
10 provided no new evidence or arguments to negate the fact that the Green litigation
11 still suggests that Plaintiffs cannot prove "Terminator 2" and "The Minotaur" are
12 substantially similar.

13 In the intervening time, of course, Plaintiffs filed their Amended Complaint,
14 adding claims based on the release of "Terminator 3." However, the Court believes
15 that, for the same reasons expressed in Section II.B.2 of this Order, there is a
16 reasonable possibility that Kassir will obtain judgment on the claims concerning that
17 film. Specifically, even when construing the complaint in the light most favorable
18 to Plaintiffs, the Court has already examined the elements of "Terminator 3" (as they
19 appeared in "Terminator 2") that are alleged to infringe "The Minotaur," and found
20 them lacking when used to prove substantial similarity between the two works.

21 Because Plaintiffs continue to reside out-of-state, there is a "reasonable
22 possibility" that Kassir will prevail in this action, and attorneys' fees and costs may
23 be awarded, a costs bond may be awarded as to Kassir.

24 Although the Court previously found that a bond was appropriate in the Costs
25 Bond Order, it determined that Kassir did not properly set forth "the nature and
26 amount of the costs and attorney's fees the defendant has incurred and expects to
27 incur by the conclusion of the action," as required by California Civil Procedure
28

1 Code section 1030(b), and denied his motion. Costs Bond Order, at p. 8. It also
 2 stated that “[m]ore information is required before the Court can examine the
 3 reasonableness of Kassar’s request.” Id. In response, Kassar has submitted a new
 4 Declaration of his attorney, Howard Horwitz, which attempts to remedy this deficit.
 5 Kassar also increased the bond amount requested from \$125,000 to \$150,000.

6 Under California Civil Procedure Code section 1030(a), Plaintiffs are required
 7 to furnish any and all costs which may be awarded in this proceeding. That would
 8 suggest that, if otherwise appropriate, they should file an undertaking for the full
 9 amount requested by the Moving Defendants. However, Gonzales v. Fox, 137 Cal.
 10 Rptr. 312, 313 (App. Dep’t Super. Ct. 1977), requires the Court to consider (1) the
 11 validity of the claim, (2) the reasonableness of the bond, and (3) the ability of the
 12 person to furnish the bond. See also Beaudreau v. Superior Ct. of Los Angeles
 13 County, 14 Cal. 3d 448, 459 (1975) (same requirements for different undertaking
 14 statute).¹¹

15 In his original declaration, filed concurrently with Kassar’s original Motion
 16 for Plaintiffs to Post a Costs Bond, Horwitz stated that he anticipated Kassar “will
 17 be able to join in Motions filed by [his] co-Defendants, reducing the amount of
 18 attorneys’ fees that would otherwise be incurred in bringing such a Motion.”
 19 Horwitz Decl. (12/19/05), at ¶ 4. His estimate of attorneys’ fees was reduced due to
 20 such anticipated joinders. Id. at ¶ 5. The Order of Dismissal later dismissed all of
 21 Kassar’s co-Defendants from the case, but without prejudice and with leave to
 22 amend within thirty days. Horwitz’s recent declaration was executed and filed
 23 following that dismissal. In it, Horwitz declares that the dismissal of Kassar’s co-
 24 Defendants “may increase Mr. Kassar’s likely fees,” as “there is a strong likelihood

25
 26
 27 ¹¹ The validity of the claim, as it relates to these considerations, is discussed
 28 *infra*.

that Mr. Kassar will be the only remaining defendant in the case.” Horwitz Decl. (3/16/06), at ¶ 6. Since that time, Plaintiffs filed their Amended Complaint, which reinstated claims against Kassar’s co-Defendants. For this reason, Horwitz’s estimates of Kassar’s litigation costs, found in his March 16, 2006 declaration, appear to once again be inflated (although not at the time they were written). The Court sees no reason why, if Kassar previously planned to join in much of the work performed by Kassar’s co-Defendants’ counsel, he could not do so now. Nevertheless, the Court believes there is enough information to determine a proper bond amount.

In his previous motion,

Kassar ask[ed] for a bond of \$125,000. His attorney, Howard Horwitz, is an experienced entertainment attorney, and estimates that a full defense, through trial, would cost \$250,000, but cuts that in half because he anticipates the matter will be resolved prior to trial. Horwitz Decl. [12/19/05], at ¶ 5. Kassar’s amount is less than that of Cameron because Horwitz believes he will simply be able to join in motions filed by co-defendants – as he does in the current motion – but will not be able to join in work for discovery or trial. Id. at ¶ 4.

Horwitz does not further describe how he reached the \$250,000 figure. Costs Bond Order, at pp. 7-8. In his current motion, Horwitz estimates that a full defense, through trial, would cost more than \$300,000. Horwitz Decl. (3/16/06), at ¶ 10. He states that his client has already accumulated more than \$23,300 in fees. Id. at ¶ 8. He also anticipates fees of \$125,000 for ongoing discovery, \$25,000 for a motion for summary judgment, and \$150,000 if the case proceeds to trial. Id. He still does not list the rate at which he bills clients.

Plaintiffs do not submit any new evidence concerning their ability to furnish a bond. In a declaration filed in Opposition to Kassar’s original motion, the

Kourtises, who are husband and wife, claimed their joint income was approximately \$1,600/month (without indicating their respective savings) and stated they did not have the money to post a bond of \$125,000 (or of greater amounts). Con Kourtis Decl., at ¶ 2. On one hand, this is a reason to lower the amount of the bond; on the other, it certainly would make it more difficult for Kassar to collect awarded attorneys' fees and costs if he was to obtain judgment and the Court was to make such an award.¹²

The Court finds that Kassar has now provided enough information to determine a proper bond amount. After weighing the validity of his claim, the nature and amount of the bond requested, and the Plaintiffs' ability to pay, the Court determines that Plaintiffs shall post a cost bond in the amount of \$100,000 as to Kassar.

As such, Kassar's renewed motion for Plaintiffs to post a costs bond is granted. Plaintiffs shall file this bond within thirty days as required by California Civil Procedure Code section 1030(d).

III. Conclusion

For the foregoing reasons, the Court:

- (1) **DENIES** Plaintiffs' Motion to Vacate the Court's Order Requiring the Posting of a Costs Bond as to Cameron;
- (2) **ORDERS** Plaintiffs to post a costs bond of \$100,000 as to Cameron within ten days of the date of this Order;

¹² As stated earlier, an Application to Proceed with Waiver of Costs based on indigence was not received by the Court, and cannot be considered in this Order. Likewise, any facts concerning Plaintiffs' financial situation that would have been submitted as supporting evidence to such an Application cannot be considered as they relate to Plaintiffs' ability to furnish a bond.

1 (3) **DENIES** Defendant Cameron's Motion to Dismiss for Failure to Post the
2 Costs Bond, without prejudice to renew his Motion should Plaintiffs not post
3 the costs bond within ten days of the date of this Order; and

4 (4) **GRANTS** Defendant Kassar's Renewed Motion for Plaintiffs to Post a
5 Costs Bond in the amount of \$100,000. Plaintiffs shall post such bond in the
6 manner specified by the California Civil Procedure Code.

7
8 IT IS SO ORDERED.

9
10 DATED: May 1 2006

DICKRAN TEVRIZIAN

Dickran Tevrizian, Judge
United States District Court